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No. 74-364

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM G. HALE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Respondent predicates his opposition to the petition in this case on the ground that the ruling of the court of appeals should be viewed as one of local District of Columbia evidentiary law not suitable for review by this Court. Contrary to respondent's contention, however, the court of appeals clearly based its holding in the instant case solely upon the Fifth Amendment ground that "[t]he prosecution may not * * * use at trial the fact that [the defendant] stood mute or claimed his privilege in the face of accusation." *Miranda* v. *Arizona*, 384 U.S. 436, 468, n. 37. The court's finding that "there was nothing inconsistent between Hale's silence in interrogation and his alibi at trial" (Pet. App. 9A) was made in order to distinguish *Harris* v. *New York*, 401 U.S. 222, which held that a defendant could be impeached by prior inconsistent utterances made at the time of arrest even before the defendant was adequately apprised of his Fifth Amendment rights.

The court of appeals never suggested that it even could—much less that it did here—dispose of this case on "local evidentiary principles."[1] In fact, the court's disposition of the government's harmless error contention makes clear that its ruling was based on federal constitutional grounds. Had the case been disposed of upon "local evidentiary principles," as respondent suggests, the trial court's cautionary instruction immediately following the prosecutor's question might have vitiated any error. The court below, however, refused to find the error harmless, since "the error, *being of constitutional magnitude,* must be harmless beyond a reasonable doubt [citing *Chapman* v. *California*, 386 U.S. 18]" (Pet. App. 13A; emphasis supplied).

Respondent contends, in effect, that this Court should not review constitutional decisions of the highest court of a State, including the United States Court of Appeals for the District of Columbia Circuit sitting as the highest court of the District, whenever the possibility exists that such decisions could have been based upon local law—regardless of the actual or stated basis for the decision. This would, however, necessitate that this Court engage in unguided speculation about the substance of local law. In the instant case, for example, respondent merely hypothesizes that "local evidentiary principles" could have been dispositive, although respondent admits that "the District of Columbia has not adopted the 'per se' rule in the tacit admissions area" (Brief in Opposition at 8).

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[1]Indeed, as this Court acknowledged in *Grunewald* v. *United States*, 353 U.S. 391, 423-424 (on which the court below partly relied and to which respondent refers):

> [T]he question whether a prior statement is sufficiently inconsistent to be allowed to go to the jury on the question of credibility is usually within the discretion of the trial judge. But where such evidentiary matter has grave constitutional overtones, as it does here, we feel justified in exercising this Court's supervisory control * * *.

An "adequate state ground" for a decision exists only when it appears that reversal of the state court's ruling on the federal constitutional issue would not alter its judgment, because the court also relied upon an independent non-federal ground that is sufficient to support its judgment. However, when a state court's decision discusses only a federal question and its judgment is rested on that ground, this Court will not decline review on the basis of speculation regarding an asserted state ground. See, *e.g.*, *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365, 375-376; Stern and Grossman, *Supreme Court Practice* 137-138 (4th ed.).

Since respondent advances no other ground for denial of our petition, we suggest that respondent has in effect conceded that the constitutional issues discussed and ruled upon by the court of appeals, about which the circuits are in sharp conflict, merit review by this Court.

For the reasons stated in our petition and this reply memorandum, it is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.

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